SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1076

PHOENIX FINANCE CORPORATION, A DELAWARE CORPORATION,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A DELAWARE CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The findings of fact, conclusions of law and decree of the District Court of Allamakee County, Iowa, appear at R. 231-252. The opinion of the Supreme Court of Iowa is to be found at R. 1923-1937 and in 20 N. W. (2d) 457. Opinions in the federal foreclosure cause are as follows: District Court, F. R. 156-179 and 19 F. Supp. 127; affirmed 8 Cir., F. R. 1689-1709 and 98 F. (2d) 416; certiorari denied, 305 U. S. 650, 676. In a later proceeding, supplemental and ancillary to the federal foreclosure cause, an opinion of the federal District Court appears in 32 F. Supp. 277; affirmed 8 Cir., 115 F. (2d) 1; certiorari granted, 312 U. S. 670; reversed, 314 U. S. 118; rehearing denied, 314 U. S. 585.

Jurisdiction

The jurisdiction of this court to grant the writ prayed is fully set forth under Heading II of the Petition (pp. 4, 5).

Statement of the Case[3]

(a) *The Cause of Action Below*

Phoenix instituted an equity cause for mortgage foreclosure in Iowa District Court for Allamakee County upon a mortgage which was security for Bridge Company's past due promissory note dated March 10, 1931 in the sum of $50,000, plus interest, and certain matured claims for money paid, laid out and expended for the use of Bridge Company. The $50,000 mortgage sued upon was an "open mortgage"[4] securing prospective advances to be made by Phoenix for the Bridge Company's account, in addition to the principal obligation represented by the $50,000 note[5] (R. 2-18).

Bridge Company defended, by plea of *res adjudicata*, that Phoenix' cause of action had been adjudicated in a certain prior cause in the U. S. District Court for the Northern District of Iowa entitled "First Trust & Savings Bank (formerly Bechtel Trust Company) and A. H. Schubert, trustees, v. Iowa-Wisconsin Bridge Company"[6] in which the same defendant had prevailed and the foreclosure of a trust indenture securing a $200,000 bond issue had been denied (R. 18-32).

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[3] See also "Summary Statement," *ante*, p. 2.

[4] The mortgage provided that "at any time during the existence of this indebtedness • • • [Phoenix] • • • is authorized • • • to pay all liens of any kind, whether prior or subsequent • • • and for the repayment of all moneys so paid, together with interest • • • this indenture shall be like security in like manner, and with like effect as for the payment of said note (R. 3).

[5] Among such items was $9000 paid by Phoenix to a contractor (R. 3, 4) to satisfy a lien on Bridge Company property. The particular pertinency of this item is discussed under Point V of the Argument (p. 36).

[6] 19 F. Supp. 127, F. R. 156-179; 98 F. (2d) 416, F. R. 1689-1709.

Phoenix replied admitting the prior decree but contending, *inter alia,* (1) that the federal court did not have jurisdiction of it because it had been neither an actual or a represented party to the federal foreclosure cause in respect of the debts in suit in the state court, (2) that if it had been a party to the federal foreclosure cause, the federal court would have been deprived of its statutory jurisdiction,[7] (3) that the issues were different, and (4) that, although the $50,000 note and mortgage sued upon in the state court had been exchanged for Bridge Company bonds secured by the trust indenture involved in the federal court action, and although the federal district court had held the trust indenture and bonds invalid, the Bridge Company had formally agreed (R. 43-48) that in the event the validity of the bonds thus exchanged for the $50,000 mortgage and note should be attacked, the plaintiff below should have the right to surrender its bonds and reinstate its $50,000 mortgage and note, which right it had exercised and upon which reinstated mortgage obligation it was then suing (R. 39-64).

The Iowa District Court sustained the plea of *res adjudicata* and dismissed the proceeding (R. 250-251). As to this aspect of the case below [8] the Supreme Court of Iowa affirmed (R. 1823-1937, 20 N. W. (2d) 457) and denied petition for rehearing on January 11, 1946 (R. 1953, 1957).

(b) *The Prior Federal Foreclosure Cause*

Bridge Company's plea of *res adjudicata* had as its foundation the following proceedings in a federal District Court:

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[7] Both Phoenix and the Bridge Company are Delaware corporations.

[8] This petition deals only with one of two causes of action asserted below. As to the second, Phoenix's right to recapture 517 shares of Bridge Company stock, which it had also exchanged for bonds, the district court denied recovery but the Supreme Court of Iowa reversed. Actually the opinion of the Supreme Court of Iowa lacks consistency because petitioner's right to assert the $50,000 mortgage debts has the same legal status as was held with respect to the shares.

A bill for foreclosure of a mortgage trust indenture was filed August 28, 1933 in the U. S. District Court for the Northern District of Iowa by the trustees named in the indenture (an Iowa Corporation and an individual resident of Wisconsin) against the Bridge Company, a Delaware corporation (F. R. 1). It was alleged therein (F. R. 2) "that this controversy is wholly between citizens of different states and the jurisdiction of this Court is based upon diversity of citizenship." The prayers of the Bill included (F. R. 10): (1) that an account be taken of the *res* and the mortgage be declared a lien thereon; (2) that an account be taken of bonds and interest and that defendant be decreed to pay complainants the amount found to be due plus costs and expenses; and (3) that, in default thereof, the mortgaged property be sold. The Bridge Company appeared and by its answer (F. R. 66) did little more than put the plaintiffs to their proof.

Then one Kendrick, applying as a proposed intervener in the right of Bridge Company, filed a motion praying (F. R. 83-84) that Phoenix Finance System, Inc., and other corporations, but not including Phoenix Finance Corporation (a distinct entity), "be made parties defendant herein and that process issue and be served for that purpose *on the ground that they are necessary and proper parties to this cause* * * *."[9] This motion was granted by order (F. R. 85-86) that "the Phoenix Finance System, Inc., and the Phoenix Finance Corporation *be made parties plaintiff in this cause, and the defendants to the petition of intervention* * * *." In a supplement opinion after final decree the District Judge said with respect to this order (F. R. 208): "*Whether the citizenship of Phoenix*

[9] Unless otherwise indicated, italics, appearing in quotations, are supplied.

Finance Corporation was at the time given any thought does not appear."

The intervention petition of Kendrick, a resident of Minnesota and a stockholder of the Bridge Company, prayed (F. R. 82, 83) that the bill be dismissed, that the mortgage deed of trust be set aside, and *inter alia* "that Phoenix Finance System, Inc.[10] and the aforesaid Phoenix Finance Companies [not including petitioner], and the Thompson Company of Iowa and the John A. Thompson Company of Toledo, *be ordered and directed to deliver to the office of the Clerk of this Honorable Court the aforesaid bonds for cancellation and that the same be cancelled* * * *." Thereupon Bridge Company amended its answer by also adding a prayer for cancellation of bonds (F. R. 68).

Although no pleading named it as a party to any issue (even for cancellation of bonds) an alias subpoena was issued directed to petitioner requiring it (F. R. 88) to "appear * * * *to answer to the bill of complaint of Bechtel Trust Company and A. H. Schubert, as Trustees;* * * * *and to* [*sic*] *petition of intervention of Fayette D. Kendrick, Intervener,* * * *." Phoenix and the other added parties were then notified by the terms of the subpoena, that, in the event of default (F. R. 88) "*the bill may be taken pro confesso against them and a decree entered thereon as prayed in said bill.*"

Phoenix being thus compelled (F. R. 88), caused its appearance to be entered by counsel (F. R. 89) "as plaintiff under order of Court and defendant to Petition of Inter-

[10] A substantial point may be made that petitioner, *Phoenix Finance Corporation*, as distinguished from another corporate entity known as *Phoenix Finance System, Inc.*, is not named in any pleading. No issue is stated (even for cancellation) to which it is a named party, and no relief is prayed against it. *Reynolds* v. *Stockton*, 140 U. S. 254; *Southern Pacific R. Co.* v. *U. S.*, 168 U. S. 1; *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316.

vention of Fayette D. Kendrick," and answered (F. R. 91, 92) putting in issue only the allegations against its alleged predecessor, Phoenix Finance System, Inc., contained in the intervention petition. The intervener in certain resistances filed in the foreclosure cause referred to his petition as a "Cross-Bill" and Phoenix' answer as an "answer to cross-bill" (F. R. 207, 393). Petitioner accepts this as a precise characterization of those pleadings.

Phoenix offered no evidence on its own behalf at hearings before a master, although certain of its officers were examined both by the trustee plaintiffs and by the intervener. The cross-complaint for cancellation was apparently never tried. The master recommended that the bill be dismissed as to $172,875 of bonds but that the prayer for foreclosure should be granted as to bonds in the amount of $27,125 (F. R. 137, 138). On December 1, 1936, upon review of the master's report, the decree forming the basis of the plea of *res adjudicata* was entered, affirming the master in part and reversing in part. The decree (F. R. 203, 204) was responsive only to the issue of mortgage foreclosure and did not purport to cancel bonds. *It merely denied foreclosure.*

By petition for rehearing Phoenix challenged the jurisdiction of the federal district court but that court held that the addition of Phoenix as a party did not oust federal jurisdiction, it being merely a "nominal or formal" party (F. R. 208-211, 19 F. Supp. at p. 141). On this point the 8th Circuit affirmed (F. R. 1691-1692, 98 F. (2d) 419, 420).[11] *Accepting this postulate, petitioner's position is that it was not a party against whom the federal decree should operate*

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[11] "It is settled that the jurisdiction of the federal court cannot be defeated by the joinder of an unnecessary party [citing cases]; and the bringing in of an unnecesary party after the commencement of the suit will not oust the jurisdiction. [citing cases] • • • Looking to the language of the trust deed alone it is apparent that the trustees are the only necessary and indispensable parties plaintiff."

as an adjudication, except to the extent that it was in the case by representation of the plaintiff-trustees.

(c) *The Limitations on the Plaintiff-Trustees' Authority to Represent Bondholders as Evidenced by the Indenture*

We are not here concerned with the question whether Phoenix was properly made a party defendant to the cross-complaint for cancellation because cancellation was not decreed. Therefore the only factual question remaining is: Did the indenture confer upon the trustees authority to represent bondholders as their agents for the collection (a) of the debts evidenced by bonds, and (b) of contract debts which became reinstated as subsisting obligations after bonds for which they had been exchanged became invalidated?

Article V, Sec. 3(c) of the indenture (F. R. 37, 38) [12] confers upon the trustees the power to "proceed to protect and enforce their rights and the rights of bondholders *under this Indenture*" and certain rights, including the rights of foreclosure and specific performance, are enumerated. Article V, Sec. 13 (F. R. 43, 44) denies to bondholders right to foreclose or to execute any trust contained in the indenture, it being "understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided * * *."

Thus the grant of the sole power to the trustee to foreclose is absolute, but at the same time, the right of action for the debt evidenced by the bonds is expressly reserved

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[12] A comparison between the provisions of the indenture here recited and corresponding provisions in *Mackay* v. *Randolph Macon Coal Co.*, *infra*, is invited. See footnote 23 post, p. 31.

to bondholders and withheld from the trustees by the following (Article V, Sec. 13, F. R. 44):

> "Nothing in this Section or elsewhere in this Indenture or in said bonds or in the coupons attached thereto shall affect or impair the obligation of the company which is unconditional and absolute to pay the principal and interest of said bonds to the respective holders thereof and of the coupons attached thereto at the respective due dates therein stated, *nor affect or impair the right of action which is absolute and unconditional of such holders to enforce such payment.*"

It was concededly possible for the mantle of authority to have been cast upon the shoulders of the trustees to sue, as the agent of all bondholders, for the entire bond debt *qua* debt. But the applicable clauses of the indenture were never called into operation,[13] as is demonstrated by an appended footnote.[14] Accordingly, the trustees lacked the

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[13] The provisions of trust deeds whereby the owners of the debt (the bondholders) purport to confer upon a stranger to the debt (the trustees) the naked right to sue therefor, as the agents of the debt owners, are subject to a rule of strict construction. See *post* pp. 28-29.

[14] The first maturities of the $200,000 bond issue were on Jan. 1 and Feb. 1, 1933 when $10,000 of bonds became due. Article V, Sec. 2 (F. R. 35) of the indenture required the trustees, in the event of default which "shall continue for a period of sixty days after written notice" from the trustees to the Bridge Company, and upon a request in writing from the holders of 25% or more of outstanding bonds, "by notice in writing * * * [to] declare the company in default * * * and/or declare the principal of all bonds * * * to be due and payable immediately. * * *"

On July 12, 1933 the trustees received a request from Phoenix (a holder of more than 25% of the issue) to declare a default (F. R. 789-791) and to initiate proceedings "to foreclose said Deed of Trust" (F. R. 790). Thereupon, the trustees, on July 13, 1933 sent a written notice to Bridge Company, whereby (F. R. 791-793), after calling attention to the above noted default as to principal of $10,000 of bonds, the non-payment of the July 1st interest on Series A bonds, and the non-payment of 1932 general property taxes, the trustees stated (F. R. 792): "You are hereby notified that the failure on the part of the Company to comply with the requirements of the Mortgage Deed of Trust with respect to the payment of interest and with respect to the payment of taxes, as above noted, within

authority to seek the relief prayed in the second prayer of the bill for foreclosure (F. R. 10) [15] *as the basis of a decree in personam against any bondholder,* in contradistinction to their right to execute the trust by an equitable foreclosure of the *res.*

However, the case below does not involve any purported attempt by Phoenix to relitigate any debt evidenced by any bond now or formerly held by it. Even if Phoenix, as a

[15] "That an account may be taken of the bonds and interest coupons secured by said Mortgage Deed of Trust and of the amount due on the said bonds for principal and interest, or otherwise, and of the amounts expended or to be expended by your Complainants; and that said Iowa-Wisconsin Bridge Company may be decreed to pay to your complainants the amount found to be due on such accounting together with costs and expenditures in this proceeding and the attorney fees by the court assessed, within a short day to be fixed by the court * * *."

Sixty (60) days from the date hereof, *may require the undersigned Trustees to declare the principal of all bonds issued and outstanding under said Deed of Trust to be due and payable immediately in addition to and irrespective of the default with respect to the payment of principal on certain of the Bonds hereinbefore set forth.* Unless [you] shall, * * * *within the time provided,* comply with the provisions of the said Deed of Trust with respect to the defaults or any of them herein noted, *the undersigned Trustees will be compelled to initiate proceedings for the foreclosure of said Deed of Trust* and take whatever other action may be necessary or required in the premises."

No further declaration or demand was made and the bill for foreclosure was filed August 28, 1933 (F. R. 1), 46 days thereafter, referring (F. R. 8, 9) to the notice of July 13, 1933 as a declaration designed to mature the whole bond issue.

By Art. V, Sec. 10 (F. R. 41) the Bridge Company promised the trustees, in the event of default in the payment of bond interest continuing for 60 days, or of default in the payment of principal of bonds "whether by regular maturity * * * or by declaration as authorized by this Indenture," that it would "then, *upon demand of the Trustees* * * * pay to the Trustees, for the benefit of the holders of the bonds * * * all such bonds and coupons then outstanding," and, if it should fail to pay principal and interest *"forthwith upon such demand,* the Trustees in their own name, and as trustees of an express trust" were authorized "to recover judgment for the whole amount so due and unpaid."

The July 13th notice from the trustees to the Bridge Company was obviously not a self-executing declaration. The trustees did not declare

bondholder, had, with other bondholders, delegated to the trustees the power to sue for the debts evidenced by bonds (in contradistinction to the debt-covenants of the trust indenture such is not this case. Phoenix did not sue below upon any bond. It sued upon a prior $50,000 mortgage securing a $50,000 note and certain further advances, including particularly a $9,000 item. That mortgage and those debts had been exchanged for bonds, under an agreement that the same would at the option of Phoenix, be rein-

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future maturities then and there payable but merely stated that, if the defaults continued for 60 days thereafter, they "may" be required to declare the principal of later maturing bonds due and payable and that "unless" the Bridge Company should correct the defaults "within the time provided" they would "be compelled to initiate proceedings" for foreclosure. Even if we were to construe the July 13th notice as a "demand" for payment of the matured $10,000 of bonds, it was not such a "demand" with respect to the unmatured $190,000, because it gave the Bridge Company 60 days to cure defaults, after which period the trustees "may" (but did not) declare an acceleration of future maturities. No agency in the trustees may be bottomed on Article V, Sec. 10.

In view of the language of the notice of July 13th it is doubtful whether the trustees really had power to start foreclosure proceedings until 60 days after the date of the notice, because they could not have foreclosed on a mortgage indenture securing a $200,000 bond issue, unless, in conformity with the indenture, future bond maturities were first accelerated by a self-executing declaration. Be that as it may, the trustees had no authority to *represent* bondholders to sue for the whole bonded debt, until there had been a *demand* for the payment of the entire debt, and there was no right to make such a *demand*, until after (or at least contemporaneously with) a *declaration of default* having the effect of making bonds, with later maturity dates, due and payable immediately. *No such declaration and demand appears in the record of the federal foreclosure cause.*

The Supreme Court of Iowa simply indulged in loose language when it remarked (R. 1931) (20 N. W. (2d) at p. 461) that Phoenix "initiated the litigation in federal court in an effort to collect the obligations it seeks here to collect." Phoenix had not sued or authorized the trustees to sue the Bridge Company *on its bonds*, much less on the then moribund $50,000 mortgage obligations. *It had merely called upon the trustees to execute the trust* and, by their letter of July 13th in pursuance of this request, the trustees put the Bridge Company on notice that if it did not make good its defaults within 60 days *they might be required to start foreclosure proceedings.*

stated if an attack were made upon the validity of the bonds received in exchange. The invalidity of the bonds was not determined until the decree in the federal foreclosure cause was entered. At some time after the case closed Phoenix exercised its option and thereby revived the former mortgage and the debts it secured. *It was impossible for Phoenix to have delegated any authority to the trustees with respect to that mortgage and those obligations because they were not in being as subsisting obligations during any of the time the federal foreclosure cause was being pleaded to issue and tried.*

Quite obviously, therefore, there could have been no agency in the trustees to have represented Phoenix with respect to the mortgage obligations in suit below.

Specifications of Error

I

The Supreme Court of Iowa in its opinion (R. 1923-1937, 20 N. W. (2d) 457) wholly failed to consider the foregoing relevant and controlling facts (see "Statement of the Case," *ante*, pp. 10-19) relating to Phoenix' lack of status as an indispensable party to the cause of action in which the decree asserted as *res adjudicata* was rendered, and to the lack of authority in the plaintiff-trustees to represent Phoenix as to the issues subsequently raised in the case below.

II

By reason of its failure to take cognizance of the relevant controlling facts the Supreme Court of Iowa failed to recognize and apply the following principles:

(a) The purported adjudication of Phoenix' underlying contract debts, due from Bridge Company and reinstated by the invalidating of bonds exchanged therefor, was an

independent [16] issue to which Phoenix would have been an indispensable party, and as to which such purported adjudication federal jurisdiction based upon diversity was wholly absent.[17]

(b) The effect of the federal decree as an adjudication *in personam* against Phoenix can only be justified upon the doctrine of trustee representation, in which event the trustees' agency must appear from the trust instrument, expressly or by clear implication.

(c) Absent such agency, the federal court could not adjudicate the invalidity of any debt evidenced by any Phoenix bond, much less any earlier debt arising by virtue of Phoenix' loans and advances to Bridge Company, which, though merged in bonds exchanged therefor, were reinstated upon the validity of bonds being challenged.

III

The Supreme Court of Iowa entirely overlooked the undisputed further facts (a) that the $50,000 mortgage in suit is, by its terms, security for an advance of $9,000 made by Phoenix for the account of Bridge Company, in addition to the recited $50,000 consideration; (b) that the decree in the foreclosure cause does not purport to adjudicate this item of claim, except by indirection as a part of an unpleaded set-off or counterclaim against Phoenix personally; and the further principle of law (c) that a judgment

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[16] The characterization as "independent" of the causes of action involved in the federal foreclosure cause of which the federal court did not have jurisdiction is taken from the opinion of the Supreme Court of Iowa. See 20 N. W. (2d) p. 461, R. 1930.

[17] The issue the purported adjudication of which is here charged against Phoenix was just as "independent" an issue as Bridge Company's cross-complaint for cancellation of bonds, and Phoenix' claim, on motion for rehearing, for the return to it of 517 shares of Bridge Company stock which had been traded for bonds subsequently invalidated.

or decree based upon an unpleaded set-off or counterclaim against one not an indispensable party and not expressly represented with respect to such claim, lacks the essential elements of procedural due process.

ARGUMENT

Summary of Argument

Point I

Phoenix was not an actual (as distinguished from a represented) party to the issue raised by the plaintiff-trustees' bill for foreclosure of the trust indenture in the federal court to which the responsive decree was on denying foreclosure because of absence of consideration for bonds. Its status as an actual, indispensable party was limited to the undecided and unpressed cross-complaint against it for cancellation.

Point II

Phoenix, as a bondholder, had not delegated to the plaintiff-trustees in the federal foreclosure cause, authority to represent it to the extent of litigating the consideration for any debt underlying mortgage bonds.

Point III

Since the plaintiff-trustees in the federal foreclosure cause had no authority to litigate the debt evidenced by (or underlying) the bonds, as distinct from the covenant of the indenture, the decree denying foreclosure was not an adjudication *in personam* against Phoenix, as a bondholder.

Point IV

Not only is the opinion of the Supreme Court of Iowa in conflict with the *Mackay* case in the 8th Circuit, but it is

also opposed to the general principles of trustee representation heretofore announced by the Supreme Court.

Point V

Quite apart from all other points here discussed, there was no finding against Phoenix in the federal foreclosure cause which can be construed as an adjudication with respect to an item of $9,000, part of the underlying consideration for the $50,000 mortgage.

Point I

Phoenix was not an actual (as distinguished from a represented) party to the issue raised by the plaintiff-trustees' bill for foreclosure of the trust indenture in the federal court to which the responsive decree was one denying foreclosure because of absence of consideration for bonds. Its status as an actual indispensable party was limited to the undecided and unpressed cross-complaint against it for cancellation.

There would seem to be little doubt but that the opinion of the Supreme Court of Iowa was based largely upon the supposed status of Phoenix as an *actual* party. Thus the court said (R. 1925, 20 N. W. (2d) p. 458): "On motion Phoenix was made a party as a co-plaintiff and filed answer to the petition for intervention." At another point (R. 1925, 20 N. W. (2d) p. 458): "Phoenix, after having been brought in as a party plaintiff, moved to dismiss for want of federal jurisdiction." With a proper understanding of the true factual situation and the deletion of the unjustified emphasis on Phoenix' supposed status, when applied to the action to foreclose the indenture, as distinguished from the action to cancel bonds, petitioner submits that a different result thereby logically evolves.

It is suggested that the naming of Phoenix as a "party plaintiff" as well as a "defendant" to the petition for intervention is not *per se* entitled to significance. The question is: As to what issue was Phoenix properly made an actual adversary party? Obviously only to the issue raised by the cross-complaint for cancellation. This Court in *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, held that the principles governing the alignment of parties for purposes of determining diversity of citizenship are (1) to "look beyond the pleadings and arrange the parties according to their sides in the dispute", and (2) to ascertain from the "principal purpose of the suit", and the "primary and controlling matter in dispute" whether the necessary "collision of interest" exists.

Phoenix was an indispensable party to the cross-complaint for cancellation but that issue was not determined and if it had been determined, it would have been a nullity because it involved an "independent" action by a Delaware corporation against a Delaware corporation. As recognized by the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) p. 464) Phoenix would have been an indispensable party to a claim on its part to recapture 517 shares of Bridge Company stock which it had exchanged for bonds, invalidated by the decree. As to that issue no federal jurisdiction existed. The choses in action asserted below are even more remote, as related to the issues of the federal foreclosure cause. Those choses in action were dormant and not capable of being litigated until the bonds for which they had been exchanged were invalidated and Phoenix had exercised its right to reinstate them. Any adjudication of those choses in action would necessarily have required Phoenix as an indispensable party in any event and, since a Delaware corporation was debtor and a Delaware corporation was creditor, federal jurisdiction could never have existed. But, as held, Phoenix was only a "nominal or formal" party.

The federal court did in fact order that Phoenix be made a party and, in pursuance thereof, process issued and Phoenix appeared and answered. As the order attempted to define the status and alignment, Phoenix was made a party "plaintiff in this cause" and a party defendant "to the petition for intervention". *But the federal court had no power to make Phoenix a plaintiff, with the trustees, in the action for mortgage foreclosure.*

It has never been suggested that a federal district court has either the power or the jurisdiction in an action of A vs. B, either on A's motion, B's motion, or its own motion, to order that C be made a plaintiff as to A's action against B.[18] However, this is exactly what the federal court purported to do if we are to consider the order as effective in bringing a new plaintiff to the bill of foreclosure, as distinguished from the status of that party as a defendant to the cross-complaint for cancellation.

Of course it is quite clear what was in the mind of the court and the moving party. The petition for intervention (the cross-bill), and later the amended answer of the Bridge Company (the answer to the cross-bill), asserted a cause of action *in personam* against Phoenix.[19]

Petitioner agrees fully with the statement contained in the opinion of the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) pp. 460, 461) that "The making of Phoenix a party plaintiff therefore had to be based on the theory that there was no independent issue between Phoenix and the Bridge Company thereby introduced * * *" Petitioner's chal-

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[18] This cannot be one even under the present Rules of Civil Procedure relating to third party practice (Rule 14). These rules were not in force at any time during the pendency of the Foreclosure Cause, and as the Advisory Committee said with respect thereto: "Third party interpleader is in some aspects a modern innovation in law and equity although well known in admiralty."

[19] If we disregard the fact that there is no pleading naming Phoenix Finance Corporation as an adversary party in interest.

lenge is that the court failed to apply this principle to the record facts above outlined. For the decree to have been *res adjudicata* of Phoenix' $50,000 mortgage, $50,000 note and $9,000 quasi-contract claim (claims not then capable of enforcement) an "independent issue" would, of paramount necessity, have had to be framed between Phoenix (a Delaware corporation) and Bridge Company (a Delaware corporation).

Added emphasis is placed upon the point here under consideration, by the holding of the court relating to Phoenix' claim to the return to it of its 517 shares of Bridge Company stock.[20] In its opinion the Supreme Court of Iowa said (R. 1937, 20 N. W. (2d) at p. 464):

> "We are more impelled to this view by reason of the fact, already pointed out, that the doctrine of res adjudicata, to the extent it is applied here, gives incidental effect to the decree of the federal court quite beyond any jurisdiction it would have had to decide the matters directly. *Phoenix' demand for a reissue or return of the stock was properly refused in the bond litigation because it was the subject of a controversy between Phoenix and the Bridge Co., not incidental or ancillary to the then pending suit and with no diversity of citizenship between the parties to support the court's jurisdiction to pass on it.*"

To paraphrase the foregoing and to apply the same to the point here being discussed—

> Bridge Company's and intervener's demand for the cancellation of Phoenix' bonds was the subject of a controversy between the Bridge Company and Phoenix, not incidental or ancillary to the then pending suit and with no diversity of citizenship between the parties to support the court's jurisdiction to pass on it.

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[20] The second cause of action below, not directly involved in this petition.

It is submitted that the federal district court properly refused Phoenix' petition for rehearing and modification, not only as to its 517 shares, but also as to a requested reservation "from adjudication the question of the validity of the $50,000 mortgage," and as to requested permission "to institute an action at law against the Bridge Company * * * for money had and received," *not because of an adjudication in personam and on the merits against Phoenix on any of those issues, but because Phoenix was not an actual party, in fact or in law, to the only justiciable controversy within the court's jurisdiction, and because, for the court to make a definitive order on either of the three requested points, would have been responsive to issues which existed solely between opposed parties who were citizens of the same state.*

The Supreme Court of Iowa, it is submitted, had, on the whole, a proper conception of the legal principles applicable to the case but went afield in their application. Thus that court said (R. 1929, 20 N. W. (2d) at p. 460):

> "The validity of any obligation of indebtedness purporting to be secured by the trust deed was put in issue *only in order to determine whether the lien of the trust deed should be resorted to for its payment.*" [20a]

Again (R. 1930, 20 N. W. (2d) at p. 460):

> "The inquiry into the validity of the bonds held by Phoenix was only for the purpose of determining *whether they were secured by the lien of a valid trust deed. The trustees had no interest in the matter beyond that point.*"

This is wholly consonant with *Kerrison* v. *Stewart, infra,* that trustees represent bondholders in matters "relating to their common interest in trust property." Thus far, but

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[20a] Italics are the court's.

no farther, said the Iowa Supreme Court, was Phoenix' interest as a bondholder represented by the plaintiff-trustees. Beyond that federal jurisdiction could not be extended (R. 1930, 20 N. W. (2d) at p, 460). The result is inescapable (and with this petitioner is in entire agreement) that the quality of the decree denying foreclosure, as an adjudication to support a defense of *res adjudicata* against Phoenix, "had to be based on the theory that there was no independent issue between Phoenix and the Bridge Company thereby introduced" (R. 1930, 20 N. W. (2d) at pp. 460, 461).

Then, with striking lack of logic, the Supreme Court of Iowa proceeded to hold (1) that Phoenix' claim for the recapture of 517 shares of Bridge Company stock exchanged for bonds was such "independent issue" and no adjudication, but (2) that Phoenix' claim of right to recapture its choses in action based upon the $50,000 mortgage, also exchanged for bonds, was adjudicated adversely to it and would support the plea.[20b]

It is submitted that the federal "jurisdictional integrity" to which the Supreme Court of Iowa makes unctuous reference (R. 1930, 20 N. W. (2d) at p. 460) has had violence done it in one instance or the other.

Point II

Phoenix, as a bondholder, had not delegated to the plaintiff-trustees in the federal foreclosure cause, authority to represent it to the extent of litigating the consideration for any debt underlying mortgage bonds.

It is freely conceded that Phoenix, a bondholder, was represented generally by the trustees named in the inden-

[20b] See *post*, p. 38, where the same lack of logic is demonstrated with respect to the adverse adjudication of an unpleaded $14,000 alleged counterclaim of Bridge Company against Phoenix personally.

ture, in the cause of action for mortgage foreclosure, and that Phoenix and every other bondholder is bound by *the decree denying foreclosure.* What is denied is that the trustees had any authority, either express or implied, to put in issue, *so as to bind bondholders in personam,* the debt evidenced by the bonds and the considerations therefor (much less preexisting debts which had merged in bonds and were only reinstated after the bonds were invalidated), because this is a matter quite different from putting such debt in issue on a justiciable question referable to the limited purposes of the trust, viz.: *Shall the security be foreclosed by a court of equity?*

The point to which the attention of the court is directed is the express limitation on the delegation of authority by the bondholders to the trustees, as evidenced by the indenture. With respect to the mortgage (the trust *res*) and the lien thereof, authority is delegated by bondholders to the trustees in broad language, but the express grant of power *as to the execution of the trust* and *the enforcement of the lien* serves to underline the equally express withholding of authority *to litigate the debt* as the basis of an *in personam* judgment against bondholders.

It is, of course, basic that trustees' authority to act as agents for and, by their acts, to bind bondholders, must clearly appear. As this court said in *Kerrison* v. *Stewart, infra* (93 U. S. at p. 161): "It remains to determine whether Charles Kerrison was authorized to represent creditors in proceedings against him to defeat the title so held for their security. This depends upon the intention of the parties, as expressed in the deed creating the trust and making him the trustee." In fact, restrictions upon bondholders' rights, being in derogation of the common law, are to be strictly construed. *Japka* v. *Delaware Valley Utilities Co.,* 40 Del. 599, 15 A. (2d) 432 (1940). "The common law right

to sue upon the notes is not affected by the remedies provided in the indenture unless its provisions exclude their right by express terms or necessary implications." *Halle* v. *Van Sweringen Corp.*, 37 Del. 491, 185 Atl. 236 (1936). To the same effect is *Manning* v. *Norfolk S. R. Co.*, 29 F. 838 (C. C. E. D. Va. 1887). See also: 6 *Fletcher, Cyc. Corp.*, Sec. 2751, p. 616; 7 *Fletcher, Cyc. Corp.*, Sec. 3180, p. 344.

As heretofore shown no agency existed in the trustees to put the bond debt in issue, except as an incident to foreclosure, and not in any event as the basis of a decree *in personam* against a bondholder on the debt evidenced by his bonds. Even more remote and even more fantastic is the idea for which the decisions below stand, viz., that the trustees were the agents of Phoenix to litigate the preexisting debts of the Bridge Company to Phoenix, created prior to the bond issue and the execution of the trust indenture, extinguished contemporaneously with the bond issue by reason of being exchanged for bonds, and reinstated only after the federal foreclosure litigation as the result of a contractual arrangement which gave Phoenix the right to revive the preexisting debts upon the invalidating of the bonds for which they had been traded.

Point III

Since the plaintiff-trustees in the federal foreclosure cause had no authority to litigate the debt evidenced by (or underlying) the bonds, as distinct from the covenant of the Indenture, the decree denying foreclosure was not an adjudication in personam against Phoenix, as a bondholder.

The conclusion of the Supreme Court of Iowa is in head-on conflict with a decision of the United States Circuit Court of Appeals for the 8th Circuit in a similar factual situation. In *Mackay* v. *Randolph Macon Coal Company*

(8 Cir.), 178 F. 881, the essential facts were as here shown.[21]

The Coal Company had outstanding in the hands of the public $3,000,000 of bonds secured by a mortgage on all of the properties. A New York bank was trustee. Upon default in the payment of interest the trustee brought an action to foreclose the mortgage. The bill asked for the sale of the mortgaged property and also for a deficiency judgment in case the proceeds of the sale should be insufficient to pay the amount due. Foreclosure was granted, the property brought only $100,000 at the sale and a deficiency judgment was entered. The Coal Company then went into bankruptcy, the trustee proved a claim for the deficiency and the same was allowed.

The bondholders claimed fraud on the part of the officers and promoters of the Coal Company in the issuance of the bonds and that $5,000,000 of stock had been issued without consideration. The trustee in bankruptcy thereupon brought suit against the stockholders to recover the par value of the stock as unpaid subscriptions. The only claim

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[21] The authority of the *Mackay* case is not in any way affected by the fact that it was decided before the 1925 Amendment to Equity Rule 10 (former Rule 92). Even before that amendment, it was held that a mortgage trustee could sue for the debt in a foreclosure proceeding if the indenture gave such authority. *Continental-Equitable Title & Tr. Co.* v. *National Properties Co.* (D. C. Del. 1921), 273 Fed. 967, held that under the indenture "the legal title to the debt or chose in action vested in the trustee upon declaration and demand" and that the trustee might seek a deficiency decree in a foreclosure cause. But no case appears where the purely procedural aspect of Rule 10 makes one an agent in fact when such authority is denied by the Indenture. To so hold would affect substantive, as well as procedural rights of the parties. Cf. *Fidelity-Philadelphia Tr. Co.* v. *Hale & Kilburn Corp.* (D. C. Pa., 1937), 24 F. Supp. 3. *In the instant case the "declaration and demand" which otherwise might be construed as vesting the legal title to the bonded debt in the trustees was never given* (See footnote 14, p. 16). Only one principle announced by *Mackay v. Randolph Macon Coal Company* is changed by the 1925 amendment to Rule 10, viz., the bondholder-parties to an indenture securing a bond issue may now "confer upon a third party [the trustee] the naked right to sue thereon."

proved in the bankruptcy proceeding was the deficiency decree and it was felt that the trustee in bankruptcy had no higher right than the holder of that claim, the mortgage-trustee. Because of apprehension that the mortgage-trustee might not be a "creditor" of the bankrupt, under whom the trustee in bankruptcy might maintain the creditors' bill against stockholders on their unpaid subscriptions, the holders of the bonds secured by the mortgage thereupon made proof of their bonds before the referee. The referee was of the opinion that the bonds merged in the deficiency judgment and disallowed the claim. Affirmed by district court. Reversed by circuit court of appeals.

It will thus be seen that the *Randolph Macon Coal Company* case presented the primary legal question here under consideration: Did the mortgage trustee represent the bondholders so that the decree in the mortgage foreclosure action precluded them from asserting their rights independently on the bonds? The result would have been precisely the same if foreclosure had been denied rather than granted. The mortgage, similar to the mortgage involved in the federal foreclosure cause *sub judice* contained a covenant by the mortgagor to pay the principal and interest of the bonds. The mortgage delegated to the trustee for right to report to "any appropriate proceeding * * * for * * * foreclosure, enforcement or satisfaction of the mortgage, or of the bonds secured thereby, *against or with reference to any property* [22] which is or may become security for the payment of the bonds, or subject to the trust." [23]

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[22] Italics are the court's.

[23] Compare this grant of power with that contained in the Indenture in this case (F. R. 38) that the trustees "shall proceed to protect and enforce their rights and the rights of the bondholders under this Indenture by a suit or suits in equity, or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate, legal or equitable remedy,

Actually *Mackay* v. *Randolph Macon Coal Company* makes out factually a much stronger case in favor of trustee representation than does the case *sub judice*. In the *Mackay* case the reserved right of bondholders was *implied*. Here, the reservation is express. Furthermore, in the *Mackay* case the court was dealing with the agency of the trustee to collect the debt evidenced by bonds. Here we are dealing with the agency of the trustees to litigate underlying and pre-existing debts for which bonds had been exchanged, and which debts *per se* were later revived.

In reversing the district court and holding that the bondholders might prove their claims on the bonds, independently of the mortgage-trustee's claim on the deficiency decree, the Circuit Court of Appeals said (pp. 884-885):

> "The foreclosure suit in which the deficiency decree was taken has this distinctive feature: The trustee under the mortgage was not the owner or holder of the bonds which it secured. In the ordinary foreclosure the mortgagee and the payee of the debt are the same. In such a case the person entitled to the decree on foreclosure is likewise entitled to a judgment at law upon the note or bond, and the court of equity in which suit is brought to foreclose the mortgage may, for the purpose of giving full relief, grant a deficiency decree, instead of turning the plaintiff over to an action at law * * *. When the mortgagee is also the holder of the note or bond which it secures, the deficiency judgment will be referred to the bond or note as its cause of action, and will bar any subsequent action thereon [Case cited]. In the present case the trustee under the mortgage is neither the holder nor the payee of the bonds. It clearly

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as the Trustees, being advised by counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid." Also compare the *express* reservations to the bondholders in the instant case of their right to litigate the debt on the bonds, with the *implied* reservation in the *Mackay* case quoted at p. 883 of the report.

could not have maintained an action at law for their collection. We are aware that the fifteenth article of the mortgage authorizes the trustee to collect and recover the principal and interest of the bonds for the owners and holders thereof. This may have reference to their collection by the enforcement of the security. If that is not its meaning, we are of the opinion that it could not confer upon the trustee the right to maintain an independent action upon the bonds. Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties [Citing cases]. Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) the trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. *Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds.* (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. *The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee. The deficiency decree, therefore, must be referred to the covenant in the mortgage, and like the mortgage itself, is collateral to the bonds, and constitutes no bar to an action thereon. The debt underlying both is the same, but the promises are distinct and give rise to separate causes of action.* This view finds added support in the provision contained in the twenty-third article of the mortgage that the remedies which it confers upon the trustee shall not be treated as exclusive of any right of the bondholders, but as cumulative."

Point IV

Not only is the opinion of the Supreme Court of Iowa in conflict with the Mackay case in the 8th Circuit, but it is also inapposite to the general principles of trustee representation heretofore announced by the Supreme Court.

The *Mackay* case has never been disapproved by the U. S. Supreme Court, nor, so far as counsel are able to ascertain, been commented upon adversely in any other circuit. Furthermore, the case is cited with approval in later cases in Circuit Courts of Appeal: *Des Arc & Pohatan Bridge Co.* v. *Austin Bridge Co.*, 94 F. (2d) 494 and *Blumgart* v. *St. Louis-San Francisco Ry. Co.*, 94 F. (2d) 712 (8th Cir.); *In re Ebeling*, 123 F. (2d) 520 (7th Cir.); *Fitkin* v. *Century Oil Co.*, 16 F. (2d) 22 (2d Cir.). The authority of the *Mackay* case was also recognized *In re A. J. Ellis, Inc.*, 242 Fed. 156 (D. C., N. J.) affd. 252 Fed. 483 (3d Cir.). In *Lane* v. *Equitable Trust Co.*, 262 Fed. 918 (8th Cir.). and *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Co.*, 15 F. Supp. 927 (D. C., S. D., N. Y.) affd. 84 F. (2d) 993 (2d Cir.) the case is distinguished, thereby recognizing its continuing authority.

On the same point but without citing the *Mackay* case, is *United States Trust Co.* v. *Gordon*, 216 F. 929 (6th Cir.). The earlier case of *National Salt Co.* v. *Ingraham* (2d Cir.), 143 F. 805 also announces the precise principle that a mortgage trustee does not (absent express authority) represent bondholders as to the debt owed them and *Kerrison* v. *Stewart*, *Shaw* v. *Railroad Co.*, and *Richter* v. *Jerome*, *infra*, are all cited as authority therefor. See also: *Moran* v. *Hagerman* (9th Cir.) 64 Fed. 499.

The principles for which the *Mackay* case is the only direct federal authority are fully consonant with the

prior pronouncements of this court on the general subject of trustee representation. This court has recognized that one who sues as representative of a class must have an actual interest in the controversy in like right with those he proposes to represent. *Georgetown* v. *Alexandria Canal Co.*, 37 U. S. 91. Trustees represent bondholders only in matters "*relating to their common interest in the trust property.*" *Kerrison* v. *Stewart*, 93 U. S. 155.

In *Shaw* v. *Railroad Co.*, 100 U. S. 605 and in *Richter* v. *Jerome*, 123 U. S. 233, this court has recognized that a mortgage trustee's right of representation relates to matters "affecting his trust"—"in the security * * * which the trustee holds and represents." *Beals* v. *Railroad Co.*, 133 U. S. 290 is not apposite because there the judgment relied upon as *res adjudicata* was itself a direct equitable action for cancellation of bonds "held by the defendants", the trustees, for the benefit of bondholders, many of whom were also parties defendant. Likewise in *Elwell* v. *Fosdick*, 134 U. S. 500, a trustee who had admitted authority "to collect the mortgage debt * * * at the request of the holders of a majority of the bonds" gave a release on the authorization of such majority. The release was held binding upon bondholders by right of representation.

This court in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, said (p. 194):

> "The complainants were trustees under the mortgage, and had no personal interest in the bonds but held legal title to the mortgage, which they were foreclosing for the benefit of others."

In *Kersh Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485 this court recognized that bondholders are bound by an adverse decree where an indenture trustee, in good faith, exercises "*his contractural authority to represent and assert the lien securing the issue.*"

Therefore, it may be asserted with assurance that this court has recognized the representative quality of a trustee's acts (1) where authority is given by contract, or (2) where the trustee's act is referable to the *res* in trust. In the instant case (a) contractual authority was lacking and was, in fact, expressly denied and (b) the underlying consideration for debts which, in turn, were the considerations for the issuance of bonds secured by an indenture were not a part of the "trust property" and the bondholders and mortgage trustees had no "common interest" therein.

Furthermore, even though the federal district court had purported to cancel bonds for invalidity, such action would not have affected the $50,000 mortgage and the debts it secured, because here, as shown, it had been specifically agreed that the $50,000 mortgage became per se enforceable by Phoenix upon an attack being made upon the bonds which had been issued in exchange therefor.

Point V

Quite apart from all other points here discussed, there was no finding against Phoenix in the federal foreclosure cause which can be construed as an adjudication with respect to an item of $9,000, part of the underlying consideration for the $50,000 mortgage.

The Supreme Court of Iowa obviously overlooked the undisputed fact that the $50,000 mortgage was an "open mortgage" providing for further anticipated financing beyond the $50,000 note and that the same included a further advance by Phoenix of $9,000 to pay liens. The $50,000 note was made up of two items of $35,000 and $15,000 respectively, which were the subject of specific findings in the federal foreclosure cause. But, as shown, the mortgage given to secure the $50,000 note was also made security for further contemplated advances by Phoenix, and on Novem-

ber 10, 1931, Phoenix had loaned to the Bridge Company the further sum of $9,000 in reliance upon the covenants of the $50,000 mortgage. The loan was made and used for the purpose of paying the Bridge Company's indebtedness to a contractor for grading work on the bridge project, which indebtedness constituted a lien on the bridge property for which the Bridge Company was liable.

The Master found that "the Bridge Company received full consideration for the said $9,000 thereof issued to Kramer & Hogg in settlement of a mechanics' lien claim" (F. R. 132, 182). The federal district court took the position with respect to the $9,000 item and a certain note for $3,125, that the Bridge Company had a counterclaim or set-off against Phoenix in the sum of $14,000 which more than covered these two items (F. R. 177, 178). But no set-off or counterclaim was asserted by any pleading,[24] and even if this issue had been raised, it would have involved solely a controversy between two Delaware corporations as opposing parties. It was in no way an ancillary issue in the federal foreclosure cause.

It seems entirely clear that the procedural situation as concerned the $9,000 additional advance, points up in unmistakable fashion petitioner's basic premise that there was an attempted adjudication against Phoenix personally in the federal foreclosure cause as the result of an equally unmistakable "independent" issue between Phoenix and the Bridge Company, viz., the unpleaded (as well as unproved) counterclaim of the Bridge Company that Phoenix had 140 shares of $100 par value stock for which it had paid no consideration.

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[24] Set-off is an affirmative defense and must be affirmatively pleaded in equity as well as law in order that advantage may be taken thereof by the party in whose favor it is assertable. *McGowan* v. *American Pressed Tan Bark Co.*, 121 U. S. 575; *United States* v. *Mitchell*, 205 U. S. 161.

The undisputed $9,000 advance of Phoenix for the account of the Bridge Company to pay liens on the bridge, remains unchallenged by any finding as to the bona fides of the considerations therefor which had been received and retained by the Bridge Company. That item and the $3125 note item were simply ignored in the federal foreclosure cause because of the supposed existence of a $14,000 counterclaim of Bridge Company against Phoenix—a counterclaim found only in the opinion of the federal district court, not asserted by any definitive pleading by or on behalf of Bridge Company, and, if it had been so asserted, a claim between adversary Delaware corporations, entirely without the jurisdictional cognizance of a federal court.

Petitioner submits that the statement in the opinion of the Supreme Court of Iowa (R. 1930, 20 N. W. (2d) at p. 460) that "the validity of the obligations represented by the Phoenix bonds in the foreclosure suit * * * could not have been litigated for the purpose of a deficiency judgment in favor of Phoenix" because this "would have been a matter between Phoenix and the Bridge Company between whom there was no diversity of citizenship," applies forcefully both to the litigation of Bridge Company's supposed $14,000 counterclaim and to its cross-complaint for cancellation of bonds. Both subjects were without the jurisdiction of a federal court.

The District Court of Allamakee County, Iowa, has decreed the cancellation of the $50,000 mortgage because of the supposed effect of the federal decree as *res adjudicata*. This has been affirmed by the Iowa Supreme Court and the issuance of a *procedendo* only awaits the determination of this petition. This will wipe out the security for the $9,000 advance (and the $9,000 debt itself) as well as the security for the initial advances. Whatever may be said on other issues, Phoenix has certainly not had its day in court for

the purpose of asserting the mortgage as security for its $9,000 loan to Bridge Company. To deprive it of the benefit of that security is a denial of due process.

Conclusion

It would be a work of supererogation for petitioner to burden this brief with citations of authorities on the question of federal jurisdiction (or lack thereof) under the statutory diversity requirement. Herein petitioner takes the position that the federal district court had jurisdiction of the parties and the issues in the foreclosure cause but that petitioner was not a party to those issues. However, it is not intended thereby to preclude this court, as an alternative approach, from reviewing (even collaterally in these proceedings) the question of federal jurisdiction in the original foreclosure cause after Phoenix was impleaded as a party "plaintiff" and as a party "defendant" to the intervention petition or cross-complaint. *It is inescapable either that Phoenix was not a party to support a judgment in personam against it, or, if such a party, that federal jurisdiction was ousted and the decree relied upon as an adjudication falls.*

Petitioner has heretofore raised the question of "due process" under the 14th Amendment as applied to the case at bar. The raising of the bar of a judgment or decree with respect to unpleaded and undecided issues, in a case where the party, against whom the judgment or decree is asserted as defense, was neither an indispensable nor a represented party, is an obvious denial of due process. As to the mortgage and debts in suit, petitioner has not had its day in court. *Hurtado* v. *California,* 110 U. S. 516; *Murray* v. *Hoboken Land, &c., Co.,* 59 U. S. 272.

The decision of the Supreme Court of Iowa is violative of the 14th Amendment.

It is respectfully submitted that this case is one calling for the exercise by this Court of its discretionary jurisdiction in order that the aforesaid manifest error may be corrected and petitioner accorded due process in the litigation of its just claims. To this end, a writ of certiorari should be granted in order that the Court may review the decision of the Supreme Court of Iowa and reverse the same.

JAMES R. MORFORD,
Attorney for Petitioner.

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